EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2015/0016

BETWEEN:

MING SHUI SUM, LAWRENCE

Appellant

and

[1] MING SIU HUNG, RONALD
[2] SHAW SIU KUEN, BERTHA
[3] MING SHIU TONG

Respondents

and

J.F. MING INC.

1st Defendant

Before:

The Hon. Dame Janice Pereira, DBE	Chief Justice
The Hon. Mde. Louise Esther Blenman	Justice of Appeal
The Hon. Mr. Paul Webster	Justice of Appeal [Ag.]

Appearances:

Mr. Paul Chaisty, QC, with him Mr. Richard Evans for the Appellant
Mr. Christopher Parker, QC, with him Mr. Stuart Cullen for the Respondents

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2016: January 12;
Written reasons delivered 12th February 2016.

Civil Appeal – Whether learned trial judge erred in exercise of discretion in adjourning the case indefinitely – Whether learned trial judge failed to take into account relevant factors and considerations – Costs – Whether learned trial judge erred in failing to grant costs to the appellant

Ming Siu Hung, Ronald and others filed a fixed date claim form and sought an order requiring Ming Shui Sum, Lawrence to amend the company's articles to their state prior to

the passing of certain resolutions and the production of aspects of the company's financial and corporate information. In answer to the claim, a defence was served by Ming Shui Sum, Lawrence. The matter was fixed for a three day trial on 13th, 14th and 15th October 2015. On 25th September 2015, Ming Siu Hung, Ronald and others applied to amend their claim. Ming Shui Sum, Lawrence did not object and the claim was amended.

The trial commenced on schedule on 13th October 2015 and for the most part, the witnesses who had filed witness statements were cross-examined. On 15th October 2015, the third and last day of the trial, after the evidence had concluded, Mr. Parker, QC, counsel for Ming Siu Hung, Ronald and others made an oral application for an adjournment of the trial in order to amend their pleadings. The application was strongly resisted by Mr. Chaisty, QC, counsel for Ming Shui Sum, Lawrence.

There was no formal written application before the learned trial judge and neither was there any evidence provided in support of the application to adjourn. In order to conclude the trial, the only outstanding matter was for the parties to make closing arguments and if necessary, to allow Mr. Parker, QC to comment on the witness statement of the witness who was unavailable for cross-examination due to old age and illness. The evidence in the trial had been concluded. However, notwithstanding Ming Shui Sum, Lawrence's strenuous opposition and despite the fact that Mr. Parker, QC provided no details as to the exact nature of the proposed further amendments and did not wish to be tied to a draft of a proposed amendment which he had in his possession, the learned trial judge granted the request of Ming Siu Hung, Ronald and others for an adjournment without indicating a possible date for the completion of the trial. The learned trial judge also declined to give the Ming Shui Sum, Lawrence costs occasioned by the adjournment and refused to order the provision of security for costs.

Ming Shui Sum, Lawrence appealed on the ground that the decision of the learned trial judge to adjourn the trial of the action on the third day, to reserve costs and to refuse to order the provision of security for costs was wrong as a matter of law because in the exercise of his discretion he failed to take into account sufficiently, or at all, the relevant facts and matters which arose in the circumstances. The relevant facts and matters included the lateness of the application to adjourn and the raising of issues to amend; the prejudice to Ming Shui Sum, Lawrence in granting an adjournment; the absence of any satisfactory explanation for the lateness of the application to adjourn and of the proposal to amend; the new allegation to be covered in the proposed amendment appears to have arisen from the second respondent's answer in cross-examination; the delay to resolution of the substantive issues in the event of granting an adjournment; the concept of dealing cases 'justly' required consideration of the interest of all the parties to the litigation; the factors referred to expressly in CPR Part 1 when considering how to deal with cases justly; the speculative nature in any event of the proposed amendments; the fact that the late amendment after the close of evidence would lead to intrinsic unfairness to Ming Shui Sum, Lawrence in terms of providing a second opportunity for Ming Siu Hung, Ronald and others to reopen the evidence and seek to improve the evidence already given; the fact

that Ming Shui Sum, Lawrence would inevitably suffer in terms of costs by the granting of an adjournment; and the inadequacy of the resorting to the shareholdings of Ming Siu Hung, Ronald and others as a means of security for costs.

Held: allowing the appeal; setting aside the 15th October 2015 order of the learned trial judge; remitting the matter to the court below for its completed hearing; and awarding costs to Ming Shui Sum, Lawrence, on the appeal and in relation to the adjournment such costs to be assessed if not agreed, that:

1. An appeal against a decision by a trial judge in the exercise of a judicial discretion will not be allowed unless the appellate court is satisfied that (1) in exercising his or her judicial discretion, the learned trial judge erred in principle either by failing to take into account or giving too little or too much weight to relevant factors and considerations, or by taking into account or being influenced by irrelevant factors and considerations and (2) as a result of the errors of principle, the trial judge's decision exceeded the generous ambit within which reasonable disagreement is possible and could therefore be said to be clearly or blatantly wrong.

   Michel Dufour et al v Helenair Corporation Ltd. [1996] 52 WIR 188 applied; **Nilon Limited and Another v Royal Westminster Investments SA** [2015] UKPC 2 [16] applied; **G v G** [1985] 2 All ER 225 applied.

2. It is clear that the learned trial judge did not take into consideration several of the relevant factors that existed at the time of the adjournment. He focused only on the need to be "just" and did not give any regard to the well-advanced stage to which the trial had progressed and the attendant consequences of the grant of adjournment so late in the day. Among the factors that should have been taken into account was the prejudice that would have been occasioned to Ming Shui Sum, Lawrence; the fact that there was no definitive indication as to the nature of the proposed amendments – the fact that in order to be able to ultimately obtain permission to amend the claim at that stage of the trial, Ming Siu Hung, Ronald and others would have had to provide a good explanation for the lateness of the application; the concept of dealing with cases justly requires the consideration of the interests of all of the parties; the prejudice that Ming Shui Sum, Lawrence would have suffered in terms of costs by the grant of the adjournment. Insofar as the learned trial judge failed to take into account several relevant factors this led him to commit an error of principle which was not within the generous ambit within which reasonable disagreement was possible. Therefore, in the circumstances the learned trial judge's decision to grant the adjournment was plainly wrong and an improper exercise of his discretion.

   Michel Dufour et al v Helenair Corporation Ltd. [1996] 52 WIR 188 applied; **Nilon Limited and Another v Royal Westminster Investments SA** [2015] UKPC 2 [16] applied; **G v G** [1985] 2 All ER 225 applied.

3. The law is well-settled on the issue of costs. Costs follow the event. In relation to the costs that were occasioned by the adjournment, insofar as the learned trial judge in exercising his discretion departed from the usual rule and decided not to grant Ming Shui Sum, Lawrence his costs he was clearly wrong. There was no basis for the learned trial judge not making the usual order and granting Ming Shui Sum, Lawrence his costs. Accordingly, Ming Siu Hung, Ronald and others are to pay Ming Shui Sum, Lawrence the costs that were occasioned by the improper grant of the adjournment.

REASONS FOR DECISION

[1] **BLENMAN JA**: This is the judgment of the Court. The Court gave a brief oral judgment on 13th January 2016. This represents the reasoned decision.

[2] Ming Shui Sum, Lawrence seeks leave to appeal against the decision of the learned trial judge which was granted on 15th October 2015 in which the judge, based on an oral application from Ming Siu Hung, Ronald and others, adjourned the trial of the underlying claim on the third and final day of its hearing, reserved costs and refused to order the provision of security. Ming Shui Sum, Lawrence is aggrieved by the learned trial judge's decision and seeks leave to appeal.

[3] With the consent of the parties, this Court approached the application on the basis that the leave application will be examined first. If we were to conclude that the Ming Shui Sum, Lawrence had satisfied the pre-requisite to be granted leave to appeal then the Court would go on to consider the substantive appeal based on the helpful written and verbal submissions of both learned Queen's Counsel.

[4] We propose now to examine the leave application.

The Leave Application

[5] The main issue that arises is whether Ming Shui Sum, Lawrence has met the threshold requirement of proving that he has a realistic prospect of success. This is a very straightforward matter and the main issue of the underlying decision

concerns the order of the learned trial judge to adjourn the hearing. We have given deliberate consideration to the submissions of learned Queen's Counsel Mr. Paul Chaisty and learned Queen's Counsel Mr. Christopher Parker and are satisfied that Ming Shui Sum, Lawrence has met the threshold and has established that he has realistic prospect of success.[1] The cases confirm that the law is well-settled. The principle that is applicable is that the appellant must show that the claim has a realistic prospect of success, or to put another way, the appellant must establish that the prospect of success is more than fanciful. Ming Shui Sum, Lawrence has satisfied this Court that he has a realistic prospect of success. Accordingly leave to appeal is granted.

The Appeal

[6] We propose now to address the substantive appeal. In order to be able to do so, it is important that we provide a brief historical background.

Background

[7] Ming Siu Hung, Ronald and others filed a fixed date claim form and sought an order requiring Ming Shui Sum, Lawrence to amend the company's articles to their state prior to the passing of certain resolutions and production of aspects of the company's financial and corporate information. In answer to the claim, a defence was served by Ming Shui Sum, Lawrence. The hearing of the claim was fixed for a three-day trial on 13th, 14th and 15th October 2015. On 25th September 2015, the Ming Siu Hung, Ronald and others applied to amend their claim. Ming Shui Sum, Lawrence did not object and the claim was amended.

[1] See: Cage St. Lucia Limited v Treasure Bay (St. Lucia) Limited and the Gaming Authority et al HCVAP2011/0045 (delivered 23rd January 2012, unreported); Othneil Sylvester v Faellesje, A Danish Foundation HCVAP2005/0004 (delivered 20th February 2006, unreported).

[8] The trial of the substantive matter was based on the witness statements that were produced. The trial commenced on schedule on 13th October 2015 and for the most part, the witnesses who had filed witness statements were cross-examined.

[9] On 15th October 2015, which was the third and last day of the three day trial, after the evidence had concluded, Mr. Parker learned Queen's Counsel who appeared for Ming Siu Hung, Ronald and others made an oral application for an adjournment of the trial. The application was strongly resisted by Mr. Chaisty, learned Queen's Counsel who appeared on behalf of Ming Shui Sum, Lawrence. There was no formal written application before the learned trial judge neither was there any evidence provided in support of the application to adjourn. In order to conclude the trial, the only outstanding matter was for the parties to make closing arguments and if necessary, to permit Mr. Parker, QC to comment on the witness statement of the witness who was unavailable for cross-examination due to illness and old age. It is clear that all of the evidence in the trial had been concluded. In the face of strenuous opposition to the adjournment, the learned trial judge granted the request of Ming Siu Hung, Ronald and others.

[10] What is of significance is that even though Mr. Parker, QC who had requested the adjournment indicated that the request was occasioned by the need of Ming Siu Hung, Ronald and others to amend their pleadings, there were no details as to the exact nature of the proposed further amendments. Indeed the transcript reveals that Mr. Parker, QC was not prepared to confine himself to the draft amendments that he had in his possession, but rather persuaded the court to adjourn the trial which was near to completion, in order to permit him to go away and formulate this application to amend and to determine the proposed amendments. The learned trial judge acceded to the request of Mr. Parker, QC and adjourned the trial without indicating a possible date for the completion of the trial. The learned trial judge

also declined to give Ming Shui Sum, Lawrence costs occasioned by the adjournment.

[11] As matters have unfolded, Ming Siu Hung, Ronald and others filed an application to amend their claim and the application was heard on 3rd December 2015. The decision has been reserved and there is no indication of the likely date of delivery.

[12] All of the above must be examined against the backdrop that the claim was filed in 2014 and the parties were given trial dates in October 2015.

[13] It is against that background that Ming Shui Sum, Lawrence filed the notice of appeal.

[14] We propose to refer to the grounds of appeal.

Grounds of Appeal

[15] The grounds of appeal are as follows:

1. The decision of the learned trial judge to adjourn the trial of the action on the third day of trial and to reserve costs and refuse to order the provision of any security in respect of costs was wrong as a matter of law because in the exercise of his discretion he failed to take into account sufficiently, or at all, the facts and matters set out below (most of the grounds are summarized below and ventilated more fully in counsel's submissions which are reproduced later in the decision):

    (a) the lateness of the application to adjourn and as to the raising of issues to amend;

(b) the prejudice to Ming Shui Sum, Lawrence of the granting an adjournment*;*

The claim was issued on 2nd May 2014. The application to amend, at the date of the application for leave, still has not been listed, without any indication as to how long thereafter judgment will be delivered.

(c) the absence of any satisfactory explanation for the lateness of the application to adjourn and of the proposal to amend**;**

(d) the new allegation to be covered in the proposed amendment appears to have arisen from the second respondent's answer in cross-examination*;*

The proposed amendment has occurred as a result of the respondents' own evidence. Ming Shui Sum, Lawrence is being penalised for the respondents' and/or their legal counsel's failure to identify such allegation in advance of the trial.

(e) the delay to the resolution of the substantive issues between the parties in the event of granting an adjournment**;**

It is unknown when the application to amend, if it proceeds, will be heard and unknown when the trial will be relisted and how much more time would be required. Accordingly, it is conceivable (given the slate of court lists in the jurisdiction) that the trial might not be effective until Michaelmas term of 2016.

(f) The impact of granting an adjournment on other court users;

No consideration was given to the effect that granting an adjournment would have on the already congested court timetable. Despite not knowing the extent of the application to amend of Ming Siu Hung, Ronald and others, the parties suggested 1 or 2 days would be sufficient with more time taken up to finish the trial which will likely involve witnesses needing to be recalled.

(g) the absence of clarity or finality and/or the lack of particulars as to any proposed amendments to be the subject of any subsequent application to amend;

Ming Siu Hung, Ronald and others would not commit to a draft of the proposed amendments. In effect, their application was essentially a request to *"please adjourn at this very late stage so that we can go away and think about and formulate some amendments"*. If a party wishes to raise matters at such a late stage of trial, at the very least it should be required to produce a final draft and complete evidence and explanations in support. If that meant Ming Siu Hung, Ronald and others working overnight (which given they had instructed Harneys in Hong Kong and which has a 12-hour time difference and therefore entirely realistic) then such was the minimum price they should have been required to pay. The learned trial judge made no reference or comment as to such failings.

(h) the prospects or lack of prospects of success of a very late application to amend;

(i) that the concept of dealing with cases 'justly' required consideration of the interest of all the parties to the litigation*;*
The reasoning behind the decision to adjourn appears to be that the issues raised might be important and that it is part of Part 1 of **Civil Procedure Rules 2000** (CPR 2000) and the overriding objective to deal with cases "justly". It was said that to advance such an objective an adjournment was appropriate. No consideration was given as to how an adjournment and the stress of many more months of being subjected to the claim by Ming Siu Hung, Ronald and others would affect Ming Shui Sum, Lawrence.

(j) the factors referred to expressly in CPR Part 1 when considering how to deal with cases justly;

(k) the history of Ming Siu Hung, Ronald and others making late applications to amend;

(l) the speculative nature in any event of the proposed amendments*;*
As at the time of preparing this notice of appeal, no final form of proposed amendments has been provided by Ming Siu Hung, Ronald and others and therefore it remains the case that they are entirely speculative in nature.

(m) Ming Shui Sum, Lawrence would inevitably suffer in terms of costs by the granting of an adjournment;
The costs were reserved. If the trial were being adjourned the only fair and proper order was for Ming Siu Hung, Ronald

and others to be ordered to pay the costs of and occasioned by the adjournment.

(n) *the late amendment after the close of evidence would lead to intrinsic unfairness to Ming Shui Sum, Lawrence in terms of providing a second opportunity for Ming Siu Hung, Ronald and others to reopen the evidence and to seek to improve the evidence already given.*

Ming Siu Hung, Ronald and others now have an opportunity to evaluate the evidence they gave in support of the claim and develop and expand further where they see fit. No consideration was given by the judge to this obvious prospect.

(o) the inadequacy of resorting to the shareholdings of Ming Siu Hung, Ronald and others as a means of security for cost.

The judge decided that no security was required because Ming Siu Hung, Ronald and others hold shares in the company. This provides no real, practical or useful security to *Ming Shui Sum, Lawrence*. *Ming Shui Sum, Lawrence* would be forced to incur expense and suffer delay if he was to try to realise the shares to recover costs, even assuming that a minority could be realised. There are no safeguards in respect of the dealings with the shares by Ming Siu Hung, Ronald and others in the meantime. Money into the court or a bond to be provided was the only fair and effective method of providing security.

All of these issues are plainly relevant to the determination of Ming Shui Sum, Lawrence's appeal. None of these issues were taken into account by the learned trial judge. If he had taken them into account and given them proper weight, he would (or should) have rejected Ming Siu Hung, Ronald and others' application to adjourn or, alternatively, if he had ordered an adjournment, the learned trial judge should have also ordered that Ming Siu Hung, Ronald and others pay the costs occasioned by the same on an indemnity basis and should have ordered the provision of security in favour of Ming Shui Sum, Lawrence.

Reliefs Sought

[16] Ming Shui Sum, Lawrence seeks the following orders:

(1) That the decision of the learned trial judge on 15th October 2015 be set aside.

(2) That Ming Siu Hung, Ronald and others do pay Ming Shui Sum, Lawrence's costs of this appeal, to be assessed, if not agreed.

The Issues

[17] The grounds of appeal can by crystallised as follows:

(a) Whether the learned trial judge erred in exercise of his discretion in granting the adjournment and not granting Ming Shui Sum, Lawrence's costs.

Appellant's Submissions

[18] Learned Queen's Counsel Mr. Chasity complains that the sole basis on which the learned trial judge adjourned the claim was his reliance on the need to be just based on the overriding objective. Mr. Chaisty, QC complained that insofar as the learned trial judge relied exclusively on the need to be just as the basis for granting the adjournment, he failed to take into account a number of relevant

factors and ought not to have concentrated exclusively on Rule 1.1 of CPR 2000 as the basis upon which to grant the adjournment.

[19] Mr. Chaisty, QC said that the law is clear in that once a trial has commenced an applicant who seeks the court's indulgence in order to obtain an adjournment has a greater onus of persuading the court to exercise its discretion in its court. He referred the Court to **Worldwide Corporation Ltd. v GPT Ltd**.[2] in support of his proposition.

[20] Mr. Chaisty, QC accepted that the learned trial judge in granting the adjournment was exercising case management discretion. He acknowledged that an appellate court would be very slow to interfere with the learned trial judge's exercise of discretion and will only do so if it were to be concluded that in the exercise of discretion the learned trial judge committed an error of principle and clearly got it wrong.

[21] Mr. Chaisty, QC argued that in the appeal before the Court it is clear that the learned trial judge erred in the exercise of his discretion by not taking into account a number of relevant factors including the fact that the trial was fixed for a period of three days and it had progressed to its third and final day and that the trial date would have been lost by the learned trial judge having granted the adjournment improperly.

[22] Mr. Chaisty, QC also adverted the Court to the fact that if Ming Siu Hung, Ronald and others required an adjournment to amend their pleadings the judge would have been required to advert his mind to the factors that are listed in CPR 20.1(3). These factors are:

[2] [1998] ALL ER (D) 667.

(a) how promptly the applicant has applied to the court after becoming aware that the change was one which he or she wished to make;

(b) the prejudice to the applicant if the application were refused;

(c) the prejudice to the other parties if the change were permitted;

(d) whether any prejudice to any other party can be compensated by the payment of costs and or interest;

(e) whether the trial date or any likely trial date can still be met if the application is granted; and

(f) the administration of justice.

[23] Mr. Chaisty, QC argued that in making his decision the learned trial judge at best only considered one very general factor; he failed to consider other relevant factors and did not balance all the various relevant factors fairly in the scale. This is one of those cases where the interference by this Court is fully justified and the matter should be remitted for the completion of the trial on the basis of the case presented on day 1 and 2. He argued that dealing with cases "justly" – it may be thought that such a basic requirement does not require expression. In any event, it is of course a requirement to be considered from the perspective of both sides to the litigation and not just one. It is not "just" to Ming Shui Sum, Lawrence to simply adjourn on the basis of a request by Ming Siu Hung, Ronald and others when it was made in such circumstances and without explanation or consideration of the consequences. The effect of the decision is to leave matters completely in limbo with no clear picture or prospect as to how matters will be progressed.

[24] In summary, Mr. Chaisty, QC said that the learned trial judge failed to give any or adequate consideration to the following factors:

(i) The lateness of the application. The trial was almost completed save for a review by Ming Siu Hung, Ronald and others of Ming Shui Sum, Lawrence's written statements and closing submissions.

(ii) The complete absence of any explanation for such late application. In seeking to explain away the fact that Ming Siu Hung, Ronald and others had been in possession of the evidence they are now seeking to rely upon since November 2013 the only point made was that Ming Siu Hung, Ronald and others were "unsophisticated". It is in fact to be noted that they had engaged lawyers since early 2014 and as late as 25th September 2015, three weeks before the trial and had raised other substantial amendments without reference to these new issues.

(iii) The incomplete nature of what was proposed as amendments. Ming Siu Hung, Ronald and others would not commit to a draft of the proposed amendments. In effect therefore, their application was to say "please adjourn at this very late stage so that we can go away and think about and formulate some amendments". If a party wishes to raise matters at such a stage of a trial, at the very least it should have been required to produce a final draft and complete evidence and explanations in support. If that meant Ming Siu Hung, Ronald and others working overnight (which given they had instructed Harneys in Hong Kong and which has a 12-hour time difference and therefore entirely realistic), then such was the minimum price they should have been required to pay. The learned trial judge made no reference or comment as to such failings. He failed to give any consideration to the history of Ming Siu Hung, Ronald and others in respect of amendments.

(iv) The obvious impact on the trial. No consideration was given to the effect of the adjournment. No consideration was given as to when the matters would return to court. Ming Shui Sum, Lawrence still does not know. The matter is in limbo. All litigation is stressful for individual litigants. The impact was not referred to and no assurances were given that matters would or could be prioritised.

(v) The lack of evidence as to when and how the new issues were discovered and the reasons why they were not raised earlier.

(vi) The failure to give any consideration as to the prospects of Ming Siu Hung, Ronald and others in successfully securing permission to amend in any event. The lack of finality and provision as to the draft, the lack of any explanation for the lateness and delay, the fact that Ming Siu Hung, Ronald and others had only three weeks earlier raised amendments, the fact that matters were being raised mid-trial and after Ming Siu Hung, Ronald and others had given their evidence and effectively closed their own case and the entirely speculative nature of what seems to be the basis of Ming Siu Hung, Ronald and others' proposed allegations in any event are all factors relevant to the decision to adjourn, as they would be relevant to any application to amend, but they were not considered at all.

(vii) The failure to give any consideration to the other aspects of CPR Part 1 and what is meant by dealing with a case "justly" and indeed, "proportionately – see CPR 1.1(2) – ensuring that parties are on an equal footing, saving expense, dealing with the case in ways which are proportionate, ensuring that a case is dealt with expeditiously and fairly, allotting to the case an appropriate share of the court's resources and enforcing compliance with rules and orders. The leaned trial judge made no reference to and gave no consideration to these express factors which

in order to consider how to deal with the matter "justly" he was required to consider.

(viii) On any application to amend, the lateness of the application and impact on the trial are highly relevant factors, as well as the merits and prospects of the issues sought to be raised. Ming Siu Hung, Ronald and others emphasised, as part of the merits of their application to amend issued on 25th September 2015, that such would not jeopardise the trial dates. The effect of them merely saying at trial that they wanted time to issue a further notice to amend was of course to stop the trial in its tracks when the adjournment was granted. It had the exact opposite effect of the factors which they emphasised in support of their application of 25th September 2015. If an application to amend had been made say the day before the trial was due to start in order to raise the new points, it is contended that it would have failed and the learned trial judge failed to consider this issue at all. As was said in **Worldwide Corporations v GPT Ltd**:

> "Where a party has had many months to consider how he wants to put his case and where it is not by virtue of some new factor appearing from some disclosure only recently made, why, one asks rhetorically, should he be entitled to cause the trial to be delayed so far as his opponent is concerned and why should he be entitled to cause inconvenience to other litigants".[3]

(ix) The raising of the new issues was not the fault or responsibility of Ming Shui Sum, Lawrence or as a result of any late disclosure or new evidence from him. The absence of a satisfactory explanation as to why an application to amend was made late and not at an earlier stage can be fatal to the application itself.[4] When considering a late application the following are relevant: the history as regards amendment and the explanation for

[3] [1988] All ER (D) 667, 11.

[4] Brown and others v Innovatorone Plc and others [2011] EWHC 3221, paras. 5 -14.

lateness, the prejudice if the application was refused and the prejudice if allowed and whether the proposed text was satisfactory in terms of clarity and particularity. These are the sort of factors that the learned trial judge should have paid some regard to: see also generally **Dany Lions v Bristol Cars**.[5] The heavy burden placed on someone making a late application to provide a good explanation is emphasised in **Quah Su-Ling v Goldman Sachs International[6] at paragraph 41**:

> "…where a very late application to amend is made the correct approach is not that the amendments ought, in general, to be allowed so that the real dispute between the parties can be adjudicated upon. Rather, a heavy burden lies on a party seeking a very late amendment to show the strengths of the new case and why justice to him, his opponent and other court users requires him to be able to pursue it. The risk to a trial date may mean that the lateness of the application to amend will of itself cause the balance to be loaded heavily against the grant of permission...it is incumbent on a party seeking the indulgence of the court to be allowed to raise a late claim to provide a good explanation for the delay".

[25] Mr. Chaisty, QC argued the learned trial judge in effect granted an adjournment simply for the asking but gave no consideration to the matters relevant to any late application to amend, which is why the adjournment was asked for in the first place. Factors to be taken into account on any application to amend are set out in CPR 20.1(3). These are all matters which this Court can and should now consider. The learned trial judge simply adjourned the trial without considering whether there was any purpose to be served by adjourning. That is, he did not give any thought and made no reference to the very weak position occupied by Ming Siu Hung, Ronald and others as to the prospects of being allowed to further amend in any event.

[5] [2014] EWHC 928.
[6] [2015] EWHC 759.

[26] He argued that the learned trial judge exercised his discretion wrongly and that this Court should therefore exercise its own discretion afresh. The case should not have been adjourned to permit an application to amend to be made at some time in the future in all of the circumstances outlined above. Ming Siu Hung, Ronald and others should not be permitted to improve their position or prospects by having obtained an order for an adjournment which should never have been made in the first place.

[27] Mr. Chaisty, QC said that even though the learned trial judge was required to have regard in a general manner to the potential prejudice to Ming Shui Sum, Lawrence, the learned trial judge did not address his mind to any potential prejudice to Ming Shui Sum, Lawrence that an adjournment would have caused. Mr. Chaisty's further complaint was that the learned trial judge paid no regard to the lateness of the application for the adjournment, the prejudice that Ming Shui Sum, Lawrence would have suffered, and critically the explanation that was given for the late verbal application for the adjournment. It was made worse by the fact that there was no evidential material before the learned trial judge in support of what was obviously a last minute afterthought application for an adjournment.

[28] Mr. Chaisty, QC also adverted the Court's attention to the fact that even the reason Ming Siu Hung, Ronald and others advanced as the basis for the adjournment, namely that counsel only became aware of the business card during cross-examination of Bertha on Day 2 and having obtained a copy of same late that night considered the matter and sought the adjournment on Day 3. However, this has proven to be incorrect and Ming Siu Hung, Ronald and others have had to resile from that position. The evidence which became available and which Ming Siu Hung, Ronald and others accept is that the business card was in the possession of their counsel in Hong Kong for several months since in 2014, therefore it was not strictly correct to say that it had only come to their lawyer's

attention recently. Mr. Chaisty, QC accepted that Mr. Parker, QC was unaware that the attorneys in Hong Kong were in possession of the business card for several months indeed that they had it since December 2014.

[29] Mr. Chaisty, QC told the Court that in the amendment application Ming Siu Hung, Ronald and others are seeking to make extensive amendments, the effect of which if granted would be to introduce entirely new claims upon which the unfairly prejudice cause of action will now have to be litigated. He says that it may well result in the reopening of the entire underlying claim and the three trial days that were utilised on 13th, 14th and 15th October 2015 may well have been wasted. As if not enough, Mr. Chaisty, QC said that this could further result in the new issues being ventilated which could well take between five and ten trial days. He anticipates that the resolution of the issues in the claim, if the amendment is granted could well drag into 2017.

[30] In his view, Ming Shui Sum, Lawrence would have to meet new claims which would result in great injustice being occasioned. Mr. Chaisty, QC complained that the learned trial judge quite improperly granted an adjournment to Ming Siu Hung, Ronald and others in a vacuum.

[31] Finally, Mr. Chaisty, QC argued that the learned trial judge was wrong to refuse to Ming Shui Sum, Lawrence costs on the adjournment. He said that costs usually follow the event and that there was no proper basis for the learned trial judge to depart from this principle and not to award Ming Shui Sum, Lawrence the costs thrown away.

[32] In conclusion, he argued this Court should set aside the order of the learned trial judge that was made on 15th October 2015 and award costs to Ming Shui Sum, Lawrence.

Respondent's Submissions

[33] Learned Queen's Counsel, Mr. Parker for Ming Siu Hung, Ronald and others argued that the court acted quite properly in granting the adjournment. He maintained that it was a proper exercise of the learned trial judge's case management discretion and that this Court should not interfere with the exercise of the discretion even if the Court were to come to the conclusion that it would have exercised its discretion differently. Indeed, Mr. Parker, QC urged this Court not to interfere with the exercise the learned trial judge's discretion. He argued that unless the proposed amendments are hopeless there is no basis upon which this Court should properly interfere with the exercise the discretion.

[34] Mr. Parker, QC said that even though the learned trial judge may not have specifically referred to all of the factors that he took into account in making the order for an adjournment, there is no dispute that in making the application all of the factors were advanced before the learned trial judge. Even though he did not specifically refer to them in his reasons it is clear that he took them into account when he granted the adjournment.

[35] Mr. Parker, QC argued that based on **Maxwell v Keun**,[7] the Court of Appeal ought to be very slow to interfere with the discretion vested in a judge with regard to a matter such as the adjournment of the trial action before him and very seldom does so. However, if it appears that the result of an order on an adjournment application would be to defeat the rights of the appellant altogether, and to do that which the Court of Appeal is satisfied would be an injustice to one of other parties, the court has power to review the order, and it is its duty to do so.

[7] [1928] 1KB 645.

[36] He said that in any event the trial would not have been completed in the three day period that was allotted and that the learned trial judge would have had to grant an adjournment. Mr. Parker, QC submitted that the trial date would have been lost in any case because the learned trial judge would have had to adjourn the trial since he would have had to entertain the oral application for the amendment.

[37] Mr. Parker, QC maintained that he was in any event entitled to apply for an amendment to the claim and insofar as the purposed amendment is not hopeless there is no basis upon which this Court could properly conclude that the learned trial judge committed an error of principle and was therefore clearly wrong in granting the adjournment.

[38] Mr. Parker, QC therefore urged the Court to dismiss the appeal with costs to Ming Siu Hung, Ronald and others.

Discussion and Conclusion

[39] We have given deliberate consideration to both the oral and written arguments of both Queen's Counsel. There is no dispute that this appeal involves a review by this Court of the exercise of the learned trial judge's case management discretion. The applicable law is well-settled and needs no recitation. It suffices to say that the locus classicus for the appellate review of the exercise of discretion of lower courts in the Eastern Caribbean is **Michel Dufour et al v Helenair Corporation Ltd.**[8] Sir Vincent Floissac said that an appeal against a decision given by a trial judge in the exercise of a judicial discretion will not be allowed unless the appellate court is satisfied (1) that in exercising his or her judicial discretion, the learned trial judge erred in principle either by failing to take into account or giving too little or too much weight to relevant factors and considerations, or by taking into account or being influenced by irrelevant factors and considerations and (2) that as a result

[8] [1996] 52 WIR 188.

of the errors of principle the trial judge's decision exceeded the generous ambit within which reasonable disagreement is possible and could therefore be said to be clearly or blatantly wrong.[9] This above principle was given judicial recognition by the Board in the recent decision of **Nilon Limited and Another v Royal Westminster Investments SA**.[10]

[40] Applying the law to the case before us, it is clear that the learned trial judge did not take several of the relevant factors into consideration. He focused only on the need to be "just" and did not pay any regard to the well-advanced stage to which the trial had progressed and the consequences that would result from the grant of the adjournment so late in the day. Among these consequences were the prejudice that would have been occasioned to Ming Shui Sum, Lawrence; the fact that there was no definitive indication as to the nature of the proposed amendments – the fact that in order to be able to[11] ultimately obtain permission to amend the claim at that stage of the trial Ming Siu Hung, Ronald and others would have had to provide a good explanation for the lateness of the application; the concept of dealing with cases justly requires the consideration of the interests of all of the parties; the prejudice that Ming Shui Sum, Lawrence would have suffered in terms of costs by the grant of the adjournment.

[41] We have no doubt that in so far as the learned trial judge failed to take into account several relevant factors this led him to commit an error of principle which was not within the generous ambit within which reasonable disagreement was possible. The learned trial judge was plainly wrong. Mr. Parker, QC submitted that the trial date would have been lost in any event since the learned trial judge would have had to grant the adjournment because firstly, he [Mr. Parker, QC]

[9] G v G [1985] 2 All ER 225.
[10] [2015] UKPC 2 [16].
[11] We find the arguments that have been advanced by Mr. Chaisty, QC very persuasive and do not intend to repeat them verbatim.

needed to make the application for the amendment and secondly, the trial would not have been completed within the three days. We do not for a moment accept Mr. Parker's submissions.

[42] We are of the considered view that but for the learned trial judge having adjourned the trial in "a vacuum" the trial could have been completed by way of written closing arguments. We concluded therefore that in all of the circumstances the learned trial judge exercised his discretion improperly and was blatantly wrong.

[43] It therefore falls to this Court to exercise the discretion afresh. In so doing, we are all of the view that given all of the circumstances that existed at the time of the adjournment and accepting the submissions of Mr. Chaisty, QC, no judge acting reasonably would have granted the adjournment of the case on the last date of trial in order to allow Queen's Counsel to go and seek to formulate an application for amendment.

[44] We are however cognisant of the turn of events and in order to do justice in this appeal insofar as the adjournment had already been granted, we are of the view that the justice of this appeal requires us to set aside the order of the learned trial judge which was made on 15th October 2015. The matter is also remitted to the learned trial judge in order for him to continue the hearing of the case with expedition.

[45] We accordingly allow the appeal against the decision of the learned trial judge to adjourn the trial on this ground and set aside the order of 15th October 2015.

Costs

[46] On the issue of costs the law is well-settled. Costs follow the event. Insofar as Ming Shui Sum, Lawrence has succeeded in this appeal he is entitled to have his

costs. Both sides have in any event agreed on this. We therefore order that Ming Shui Sum, Lawrence is to have his costs on appeal, which should be assessed if not agreed within 30 days of 12th January 2016.

[47] In relation to the costs that were occasioned by the adjournment, we are of the view that the learned trial judge in exercising his discretion not to grant Ming Shui Sum, Lawrence his costs was clearly wrong. There was no basis for him not making the usual order and granting Ming Shui Sum, Lawrence his costs. We are therefore of the view that insofar as the learned trial judge departed from the usual rule he was wrong to do so. Accordingly, we will allow the appeal on this ground also and order Ming Siu Hung, Ronald and others to pay Ming Shui Sum, Lawrence the costs that were occasioned by the improper grant of the adjournment. These costs are to be assessed if not agreed within 30 days of 12th January 2016.

Conclusion

[48] The appeal is allowed and the order of the learned trial judge dated 15th October 2016 is set aside.

[49] Ming Shui Sum, Lawrence is to have his costs on this appeal and those occasioned by the adjournment such costs to be assessed if not agreed within 30 days.

[50] The Court gratefully acknowledges the assistance of all counsel.